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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-855

ALLEGHENY AIRLINES, INC., *Petitioner*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *and its Chairman,* GEORGE I. BLOOM, *and* WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III, *and* LOUIS J. SPARVERO, *Members of the Commission, Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Allegheny Airlines, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on July 21, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 13a) is reported at 465 F.2d 237. The opinion of the United States District Court for the Eastern District of Pennsylvania (App. 1a), entered November 10, 1970, is reported at 319 F.Supp. 407.

JURISDICTION

The judgment of the Court of Appeals (App. 29a) was entered on July 21, 1972. A timely petition for rehearing was denied on September 13, 1972. (App. 31a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

May a federal district court abstain from hearing a case, admittedly within its jurisdiction, where the only question presented is whether the Congress of the United States, by the Federal Aviation Act of 1958, has preempted the power of the states to regulate the schedules and patterns of service of federally certificated and subsidized interstate air carriers?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article VI, provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The pertinent provisions of the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. (App. 33a), and the Public Utility Law of the Commonwealth of Pennsylvania, Act of May 28, 1937, P.L. 1053, art. I, §1 et seq. (App. 34a), are set forth in the Appendix.

STATEMENT OF THE CASE

Allegheny Airlines, Inc.[1] brought this action against the Pennsylvania Public Utility Commission, on September 12, 1969, seeking a judgment declaring that certain of the Commission's orders and rules to show cause, relating to schedules and patterns of service between Pennsylvania cities on Allegheny's federally certificated interstate routes, constituted an unlawful intrusion upon an area of exclusive federal jurisdiction.

The jurisdiction of the district court was invoked pursuant to (a) 28 U.S.C. §1337, in that the action arose under an Act of Congress regulating commerce, namely, the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., and (b) 28 U.S.C. §1331, in that the matter in controversy arose under the Constitution and laws of the United States, specifically Article VI, Clause 2 of the Constitution of the United States and the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq. Additionally, it was averred that petitioner and the respondents were citizens of diverse states and that the amount in controversy exceeded the sum or value of $10,000 exclusive of interest and costs.

The offending orders and rules to show cause issued by the Pennsylvania Commission require Allegheny to maintain direct service between each pair of Pennsylvania cities on Allegheny's routes unless authorized by the Pennsylvania Commission to abandon such service.[2] It

1. Allegheny is the largest local service carrier in the United States, having carried over 4.5 million passengers in 1968. Allegheny's route structure as certificated by the CAB, in 1969, covered 17 states, the District of Columbia and Canada, with air service being provided to some 88 cities through a total of 67 airports, only 13 of which were within Pennsylvania. Allegheny has Pennsylvania Commission certificates of convenience to carry passengers between Pennsylvania cities named in its CAB route structure.

2. The context in which Pennsylvania regulation of Allegheny exists is indicated by the fact that the 1968 revenues from intra-Pennsylvania passengers amounted to only 2.32% of Allegheny's total revenue; and of the 4.5 million passengers carried by Allegheny in the same year, only 2.7% were intra-Pennsylvania passengers.

is uncontested that the Civil Aeronautics Board (CAB), the instrumentality of the United States charged with the regulation of routes and patterns of service provided by federally certificated air carriers, does not require such direct service.

The Congress of the United States, by the Federal Aviation Act of 1958, has directed the CAB to promote the development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States. (App. 33a) Besides the regulation of rates and service by these carriers, the Board is also charged with determining the amount of federal subsidy paid annually to each air carrier. The amount of the subsidy paid to Allegheny in the years 1959 through 1968, inclusive, totaled more than $85,000,000.

The CAB, by its counsel, appeared before the district court and advised the court that the Board in certificating service between points within a state, considers the needs of both interstate traffic and local traffic between those points. The Board took the position that Allegheny's interstate operations under its CAB certificate and its operations between points in Pennsylvania under the Commission's certificate were so inextricably intertwined as to preclude any practical or legal separation, and that the Federal Aviation Act had left no room for the type of regulation imposed by the Pennsylvania Commission.

On November 10, 1970 the district court denied Allegheny's motion for summary judgment and granted the Commission's motion to the extent that it requested a dismissal of the action. Despite the district court's recognition (App. 4a) of the nationwide impact of the outcome of this suit on the federal-state roles in the regulation of air commerce, the district court decided to abstain from the exercise of its admitted jurisdiction.

The district court predicated its conclusion that abstention was proper on grounds of federal-state comity and the existence of an unclear question of state law, i.e., whether the Pennsylvania Commission actually had the

authority under state law to issue the orders and rules to show cause involved.[3]

Upon appeal by Allegheny, the United States Court of Appeals for the Third Circuit held that the district court had properly abstained for the purpose of avoiding federal-state friction. In so doing the Court found that Allegheny's position created "a serious possibility of disturbing the orderly state system of agency regulation of transportation within Pennsylvania." (App. 23a)

The Court of Appeals found it unnecessary to decide whether the district court had correctly concluded that there existed an unclear question of state law. It noted, however, that "the PUC's authority to take the measures described above seems clear. 66 P.S. §1122." (App. 22a).

REASONS FOR GRANTING THE WRIT

The district court and the Court of Appeals below have in this case worked a radical extension of the abstention doctrine. In effect, the courts below have abandoned to state courts the power to decide the issue of federal pre-emption in a regulatory field; i.e., whether the Congress intended by legislation to so occupy a field of regulation as to preclude concurrent state regulation. Such a result conflicts with the prior decisions of this Court; and conflicts with a decision of the United States Court of Appeals for the Second Circuit, which has held that abstention is "peculiarly inappropriate" in preemption cases. If permitted to stand, the decision of the courts below will inevitably result in an exacerbation of federal-state conflicts relating to regulatory jurisdiction.

The Circuit Court was apparently led to this astonishing result by an unwarranted deference to state procedures to the exclusion of the federal regulatory system established

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3. This authority was never questioned by the parties.

by Congress. Thus, in response to Allegheny's arguments that PUC jurisdiction over schedules had been preempted, the Court says (App. 24a):

> "The issue, thus, is not, at this stage, whether the airline may or may not discontinue the service in question because federal legislation has preempted the field. The issue is whether a state certificated public utility may arbitrarily ignore the procedural rules of the Commission which require that issues, including jurisdictional issues, be raised before discontinuance of service."

It is respectfully submitted that if Congress has preempted state regulation of scheduling by a federally certificated interstate carrier, the state has no jurisdiction, by procedural rules or otherwise, to restrict Allegheny's scheduling changes. Moreover, the issue is not affected by the fact that the state directs its orders only to Allegheny's state certificated routes, where as here they are inextricably entwined with the federally certificated routes. It is the impossible burden of contending with regulation by many states over service inextricably intertwined with interstate service that brought Allegheny to the federal courts. See *Colorado v. United States*, 271 U.S. 153 (1926).[4]

For the purpose of judging the propriety of abstention in this case, it must be assumed that Congress intended to preempt state regulation of scheduling by a federally certificated air carrier. Under such an assumption, the decisions of the courts below create a dangerous precedent

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4. The Circuit Court decision includes five itemized bases for its decision, each of which reflects this same concern for local regulation of Allegheny's limited Pennsylvania business to the exclusion of the federal regulatory system and the potential injury to Allegheny's interstate passengers and business which is inseparable from the treatment of its local business.

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in the abdication of federal court jurisdiction to settle federal questions.

I. The decisions of the courts below conflict with the decisions of this Court in abstention-preemption cases.

The courts below either ignored or denied the applicability of two controlling decisions by this Court; namely, *Public Utilities Commission of Ohio v. United Fuel Gas Company*, 317 U.S. 456 (1943) and *City of Chicago v. Atchison, Topeka & Santa Fe Railway Company*, 357 U.S. 77 (1958).[5]

In *P.U.C. of Ohio*, United, an interstate gas pipeline company, brought an action to restrain enforcement of the Ohio Commission's order assuming jurisdiction over its rates. United argued that the Federal Power Commission had exclusive jurisdiction over its rates by virtue of the Natural Gas Act of 1938. This Court held that abstention was unwarranted, even though there existed a doubtful question of state law, since the federal question of preemption would still remain after resolution of the state law issue and reference to the state court would only further delay a final determination of the controversy.

City of Chicago involved the validity of an ordinance requiring a certificate of public convenience and necessity for the operation of interterminal vehicle services. The railroad brought an action in the district court alleging that the ordinance, if it applied to their transfer service, was inconsistent with the provisions of the Interstate Commerce Act as well as the Commerce Clause of the Constitution. The district court dismissed the complaint, but the Court affirmed, holding that the case was not a proper one for abstention.

5. Although petitioner urged that they were controlling, the Court of Appeals did not cite or discuss either of these cases.

NTED CLOSE TO EDGE

The district court, in the instant case, distinguished *P.U.C. of Ohio* on the theory that the holding in that case was ascribable to the inordinate delay there involved. (App. 10a) This Court's discussion of the delay, however, was presented in the context of explaining why, even despite the presence of an uncertain question of state law, abstention was improper. There is nothing in that decision to suggest that this Court would even have mentioned the possibility of abstention had not such an unsettled state law question existed.

The district court distinguished *City of Chicago* on the ground that the state courts in the instant case have not as yet determined the extent of the Pennsylvania Commission's authority to regulate air carriers. (App. 11a). Presumably the district court below believed that there had been such a determination by the state courts in *City of Chicago*. But the opinion of this Court clearly demonstrates that the contrary was true. The City argued that the federal court should stay its hand until a state court had authoritatively ruled that the inter-terminal transfer vehicles came within the provisions of the ordinance. This Court rejected that argument (357 U.S. at 84): "We see no ambiguity in the section which calls for interpretation by the state courts. . . . Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight."

Both courts below predicated their decisions that abstention was proper in this case on two cases: *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) and *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341 (1951). Neither case is in point.

Burford was a federal action by Sun Oil attacking the validity of an order by the Texas Railroad Commission granting Burford a permit to drill four oil wells. Sun Oil contended that the order denied it due process of law. This Court noted that, due to geologic facts, an oil field had to

be regulated as a unit for conservation purposes and that the federal government had chosen to leave "the principal regulatory responsibility" to the states. (at 319) This Court pointed out that the State of Texas had a vital interest in the proper regulation and conservation of Texas oil fields and that its Commission had acquired a specialized knowledge regarding such regulation. The Court also stated that the case "raised a number of problems of no general significance on which a federal court can only try to ascertain state law." (at 331) Finally, the Court held that the regulation of oil prorationing programs "so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." (at 332)

Alabama Public Service Commission v. Southern Railway Company involved an application by the railroad to the Alabama Commission for permission to discontinue two intrastate trains on economic grounds. After hearing, the Commission denied permission. The railroad then brought an action in the federal court, alleging that the order denying permission constituted a deprivation of property without due process of law. This Court held that abstention was proper since the problem of balancing public necessity and any loss to the railroad on the two trains was essentially a local problem.

It is readily apparent that *Burford* and *Alabama Public Service Commission*, where abstention was found proper, have common characteristics which distinguish them from *P.U.C. of Ohio* and *City of Chicago*. First, no conflict of federal and state regulatory authority was presented in *Burford* and *Alabama P.S.C.*; a clear conflict existed in *P.U.C. of Ohio* and *City of Chicago*. Secondly, the only federal question presented in the first two cases was the relatively amorphous due process claim; in the latter two a federal issue of congressional preemption was involved. Thirdly, the first two cases involved situations where the federal government's interest in the subject matter (two trains

between points within Alabama, and Texas oil fields) was remote and minimal in comparison with the immediacy and importance of the states' interest; whereas, in the second two cases the federal interest in protecting the integrity and coherence of federal regulatory plans for interstate commerce from unwarranted interference by the states was vital and paramount.

The controversy here presented, between Allegheny Airlines and the Pennsylvania Commission, fits the *P.U.C. of Ohio* and *City of Chicago* mold precisely. First, there is a direct conflict in federal and state regulatory authority. Second, a federal preemption question is involved; namely, whether Congress intended to vest principal responsibility for the regulation of air commerce in the Civil Aeronautics Board. Finally, the federal interest here is the protection of the regulatory scheme embodied in the Federal Aviation Act from interference by the Pennsylvania Commission. In addition, the federal government has a pecuniary interest in preventing the drain on the United States Treasury which will be caused by Allegheny's increased subsidy needs arising from the Commission's interference. It is also fair to say that the CAB has had far more experience with the effect of local schedules on interstate air travel than has the Pennsylvania Commission. Moreover, Pennsylvania has no unique or special interest in air travel between Pennsylvania cities on Allegheny's interstate routes which would override the CAB's interest on behalf of interstate passengers. There is therefore no ~~case, 447 F.2d 1143 (9th Cir. 1971), aff'd 405 U.S. 1035 (1972) court.~~ BASIS IN Federal-State comity FOR ABSTENTION IN THIS CASE.

II. The decision of the Court of Appeals for the Third Circuit herein conflicts with the holding of the Second Circuit that abstention is "peculiarly inappropriate" in preemption cases.

The propriety of abstention in a preemption situation was examined in *Chemical Specialties Manufacturers Asso-*

ciation, Inc. v. Lowery, 452 F.2d 431 (2d Cir. 1971). In that case the plaintiff organization of manufacturers brought an action for declaratory and injunctive relief against New York City and its Fire Commissioner contending that city regulations relating to the packaging of hazardous substances constituted an impermissible invasion of a regulatory area preempted by the Federal Hazardous Substances Act, 15 U.S.C. §1261 et seq. The district court concluded that it should abstain from exercising jurisdiction and leave the plaintiff and its members to the appropriate and competent state courts, in which they might assert all legal defenses available to them.

Judge Friendly, for the court of appeals, reversed (at 433):

> We cannot accept the district court's suggestion that this is an appropriate case for invoking the doctrine of abstention. The Supreme Court has recently observed that the "abstention cases have dealt with unresolved questions of state law which only a state tribunal could authoritatively construe." *Wisconsin v. Constantineau*, 400 U.S. 433, 438, 91 S.Ct. 507, 511, 27 L.Ed. 2d 515 (1971) (citation omitted). Here there is no uncertainty with respect to the City Regulations that would call for construction by the state courts in the first instance. As will be seen, such difficulties in statutory construction as exist pertain rather to the relevant federal laws, and a federal court is better equipped to deal with these. *Indeed, abstention is peculiarly inappropriate when the federal claim is that the state has been ousted from jurisdiction . . . (Emphasis supplied)*

Judge Oakes, who dissented from the court of appeals' result in *Chemical Specialties*, agreed with Judge Friendly on the abstention issue (at 440): "Nor, in view of the claim of federal preemption, is this a case where abstention might be proper . . .".

In this case there is no uncertainty about the Pennsylvania Commission's statutory authority to regulate intrastate air carriage. The only possible issue is whether that jurisdiction has been preempted by the Federal Aviation Act. A federal court should not abstain from deciding that issue.[6]

The conflict between the decision of the Third Circuit in this case and the decision of the Second Circuit in *Chemical Specialties* should be resolved by this Court. Failure to do so will add to the difficulty and complexity attendant on the resolution of federal-state controversies and will cause unnecessary delay in their resolution.

III. Abstention by the federal courts in preemption cases will not avoid federal-state conflicts, but rather will prolong and exacerbate them.

The essence of the abstention doctrine is clear: federal courts, for reasons of federal-state comity, should avoid needless conflict with state agencies. But in a preemption situation there is no question of avoiding the federal-state conflict. That conflict already exists by virtue of the conflicting federal and state regulation.

The only question presented in a preemption situation is where and when the federal-state conflict will be resolved. The choice is between an early resolution in the

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6. See *Northern States Power Company v. The State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972) wherein an electric utility company brought an action against the Minnesota Pollution Control Agency for a judgment declaring that the Atomic Energy Commission's authority to regulate radioactive releases by nuclear power plants was exclusive so as to preclude state regulation. The district court entered the declaratory judgment for the plaintiff, and the Eighth Circuit and this Court affirmed. The abstention issue was not discussed. Apparently it did not occur to either the parties or the courts that the question of federal preemption should be left, in the first instance, to the Minnesota state courts.

federal court and a delayed resolution in the state court. Since the issue relates to the interpretation of a federal statute and the intent of Congress in enacting it, the federal court is certainly the logical forum.

Precisely this rationale was adopted by this Court in *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501 (1954). There the Board sought to restrain the enforcement by a union of a state court injunction on the grounds that the Board had been vested with exclusive jurisdiction over the subject matter of the dispute there involved. The Court held (at 504-05):

> In absence of a command of the Congress to the contrary, the power of the District Court to issue the injunction is clear. Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. See *Alabama Commission v. Southern R. Co.*, 341 U.S. 341. But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission v. Gas Co.*, 317 U.S. 456, 468-470; *Bowles v. Willingham*, 321 U.S. 503, 510-511.

The fact that the plaintiff in *Capital Service* was a federal agency is not a significant distinction, as is clearly evidenced by this Court's citation of *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) wherein the plaintiff was a private party.

The price of abstention, as Professor Wright has noted, is not cheap. Wright, *Federal Courts* §52 (2d ed. 1970). "Abstention certainly involves duplication of effort and expense and an attendant delay." *Reetz v. Bozanich*, 397 U.S. 82, 86 (1970).

Allegheny Airlines does not question the wisdom of requiring federal courts to refrain from injecting federal power into a dispute between a state and a private party, where the federal government otherwise has no interest in the dispute. But where, as here, the federal interest in the controversy is not only real, but acute, and the conflict between federal and state power already exists, abstention is not only wholly unwarranted but will actually exacerbate federal-state relations by postponing resolution of the existing federal-state conflict.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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ALLEGHENY AIRLINES, INC.

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *and its Chairman, George I. Bloom, and William F. O'Hara, James McGirr Kelly, Daniel Huyett, III, and Louis J. Sparvero, Members of the Commission, Defendants.*

Civ. A. No. 69-2148

United States District Court,
E. D. Pennsylvania.

Nov. 10, 1970.

As Amended Nov. 18, 1970.

OPINION

LUONGO, District Judge.

This is a suit by Allegheny Airlines, Inc. (Allegheny) to have declared null and void certain actions against it by the Pennsylvania Public Utilities Commission (PUC), and to enjoin permanently the PUC and its individual members from proceeding further against Allegheny or its employees for violations of the laws of the Commonwealth of Pennsylvania.

The matter is before the court on cross motions for summary judgment filed by Allegheny and PUC. All the facts have been stipulated. They will be adverted to in the course of this opinion only to the extent deemed necessary to an understanding of the discussion of the legal issues.

I. *Factual Background*

Allegheny was originally certificated by the PUC in 1941 to transport property by air in intrastate commerce within Pennsylvania pursuant to the Pennsylvania "Public Utilities Law," 66 P.S. §1101, et seq. In January, 1949 Allegheny received a certificate from the Civil Aeronautics Board (CAB), the federal regulatory agency established under the Federal Aviation Act, 49 U.S.C. §1301 et seq., to provide interstate passenger service over a route structure covering the District of Columbia and seven states, including Pennsylvania. In March, 1949 the PUC approved Allegheny's application to transport *persons* and property by air in intrastate commerce within Pennsylvania. The intrastate routes authorized by the PUC paralleled Allegheny's interstate routes within the boundaries of Pennsylvania.

Under its CAB certificate, Allegheny is a "local service" carrier, i. e., one which provides service between smaller cities, linking them with larger ones where connections can be made with the "trunk line" carriers (e. g., American Airlines, United Air Lines) which primarily provide long haul service between larger cities. Allegheny is now the largest "local service" carrier in the United States, with an interstate route structure covering seventeen states, the District of Columbia and parts of Canada. Allegheny has intrastate rights in nine of those states, including Pennsylvania. For the fiscal year ending September 30, 1969 its gross revenues aggregated almost $113,000,000, including a federal subsidy[1] of approximately $3,000,000. A little more than 2% of Allegheny's 1969 revenues were generated by intrastate traffic within Pennsylvania.

1. The federal subsidy received by a local service carrier is determined by the need of a carrier for funds to make up operating deficits from unprofitable local, short-haul routes. In order for a carrier to be eligible for a federal subsidy, it must prove to the satisfaction of the CAB that the expenditures were those that any efficient and honest management would make. 49 U.S.C. §1376.

For the efficient operation of its interstate routes, Allegheny makes frequent changes in its patterns of service and schedules. Under federal law, Allegheny is permitted to make such changes without interference from the CAB so long as it provides adequate service. 49 U.S.C. §§1371(e)(4), 1374(a). See Capital Airlines, Inc. v. Civil Aeronautics Bd., 108 U.S.App.D.C. 215, 281 F.2d 48 (1960). The CAB does not require Allegheny to maintain direct plane service between intermediate points on its interstate routes, it being sufficient if Allegheny services each intermediate point on such routes by two round trips in each direction each day, regardless of point of origin or destination.

In 1963 Allegheny discontinued single plane direct service on the 71-mile Williamsport-Harrisburg segment of its PUC intrastate route No. 5. Since that time it has discontinued furnishing single plane direct service between some other pairs of points on its six intrastate routes[2] authorized by the PUC. It has also been furnishing service between some intrastate points not specified in its PUC certificate. The PUC has taken the position that its certificate requires Allegheny to maintain single plane direct service between all pairs of points on authorized intrastate routes in Pennsylvania, and that Allegheny may not provide intrastate service between points within Pennsylvania not specified in the PUC certificate.

After attempts to resolve the matter amicably the PUC

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2. Allegheny's present intrastate route structure is as follows:

(1) Between Pittsburgh and Bradford.

(2) Between Pittsburgh and Philadelphia via Johnstown, Altoona, Harrisburg, Lancaster, and Reading.

(3) Between Pittsburgh and Stroudsburg/East Stroudsburg via Johnstown, Altoona, Bellefonte/State College, Lock Haven, Williamsport and Scranton/Wilkes-Barre.

(4) Between Harrisburg and Scranton/Wilkes-Barre.

(5) Between Erie and Harrisburg via Bradford and Williamsport.

(6) Between Pittsburgh and Allentown/Bethlehem/Easton, via Johnstown, Altoona, Bellefonte/State College, Williamsport, Harrisburg and Scranton/Wilkes-Barre.

issued rules (at different times) on Allegheny to show cause why its state certificate should not be cancelled or other penalties imposed (a) for abandoning direct plane service between Williamsport and Harrisburg; (b) for abandoning direct plane service between other pairs of points on its intrastate routes; and (c) for furnishing intrastate service not authorized by the PUC. At the hearing on the rule to show cause on the abandonment of Williamsport-Harrisburg direct service[3] Allegheny declined to present evidence and answered only that the PUC lacked jurisdiction over routes, flight frequency and schedules of intrastate carriage of persons and property where that service is part of a federally certificated route operated by a federally certificated interstate carrier operating under the rules and regulations of the CAB.

On June 23, 1969 the PUC entered an order making the rule absolute, imposing a fine of $5000 on Allegheny and directing Allegheny to reinstitute direct service between Williamsport and Harrisburg within thirty days or file a petition with the PUC to abandon such service. After the time for filing an appeal from the PUC order to the state courts had passed, Allegheny instituted the instant suit to enjoin the PUC and the individual members thereof from taking any actions against Allegheny or its officers based upon changes in patterns of service or frequency or scheduling of service.

Because of the nationwide impact of the outcome of this suit on the federal-state roles in the economic regulation of air commerce, both the CAB and the National Association of Regulatory Utility Commissioners (NARUC) sought, and were granted, leave to file briefs *amicus curiae*. The CAB also participated in oral argument. The CAB supported Allegheny's contentions on the merits but took "no position with respect to procedural issues or questions of judicial jurisdiction." (CAB's brief, page 6). NARUC's

3. The rule to show cause on items (b) and (c) has been stayed by the PUC pending the outcome of these proceedings.

brief supports the PUC both on the merits and, in particular, in attacking the propriety of federal intervention in the absence of exhaustion of state processes.

II. *Jurisdiction*

It is Allegheny's position in the instant suit that the PUC's attempt to exercise control over it is invalid as a matter of federal law because (a) the field of economic regulation of interstate air carriers, at least insofar as patterns of service and scheduling are concerned, has been preempted by the Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., particularly §§1302[4] and 1371(e)(4)[5] of the Act; (b) the PUC orders conflict with Allegheny's rights and obligations under its CAB certificate of public

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4. 49 U.S.C. §1302 reads, in pertinent part, as follows:

"In the exercise and performance of its powers and duties * * *, the Board shall consider the following * * * as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate economical, and efficient service by air carriers at reasonable charges * * *;

* * * * *

(f) The promotion, encouragement, and development of civil aeronautics."

5. 49 U.S.C. §1371(e)(4) reads, in pertinent part, as follows:

"No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. * * *"

convenience and necessity; and, (c) the PUC orders attempting to regulate patterns of service and scheduling impose an undue burden on interstate air commerce. Although Allegheny and the CAB concede that the states have authority to control certain economic aspects[6] of intrastate air commerce, they contend that such authority does not extend to a federally certificated air carrier servicing an interstate-intrastate route. Accordingly, Allegheny asserts that its dispute with the PUC presents a controversy arising under the Constitution and laws of the United States and that this court's jurisdiction[7] is properly invoked under 28 U.S.C. §1331(a).[8] It asserts further that the federal courts should decide the federal questions rather than leave them for determination by state tribunals. I disagree.

In suits in the federal courts arising out of proceedings pending or threatened in state tribunals, the federal court's jurisdiction may not be predicated upon federal question defenses to the state proceedings.[9] See Public

6. Safety regulations involving aircraft and air flights are exclusively within the jurisdiction of the Federal Aviation Administration.

7. Neither party requested the convening of a three-judge court under 28 U.S.C. §2281. Since it appears that Allegheny is not attacking the constitutionality of the Pennsylvania Public Utility Law, but rather is basing its argument generally on supremacy of federal law, I have assumed that the matter is properly before me as a single judge. See Swift & Co. v. Wickham, 382 U.S. 111, [86 S.Ct. 258, 15 L.Ed.2d 194] (1965); Pennsylvania Public Utility Comm. v. Pennsylvania R.R. Co., 382 U.S. 281, 86 S.Ct. 423, 15 L.Ed. 2d 324 (1965).

8. 28 U.S.C. §1331(a) reads as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter of controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

9. There are exceptions to this principle, notably in suits arising under the Civil Rights Act, 42 U.S.C. §1981 et seq., 28 U.S.C. §1443. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965).

Serv. Comm. of Utah v. Wycoff, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); Public Utilities Comm. of California v. United Air Lines, Inc., 346 U.S. 402, 74 S.Ct. 151, 98 L.Ed. 140 (1953); rev'g 109 F. Supp. 13 (N.D.Cal. 1952); California v. Oroville-Wyandotte Irrigation Dist., 409 F.2d 532 (9th Cir. 1969); Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, 186 F.Supp. 674 (D. Nev. 1960). It is only if the state *complaint* raises federal questions that the federal court's jurisdiction may be based on federal question grounds. Public Serv. Comm. of Utah v. Wycoff, *supra*.

Allegheny, in the instant suit, seeks a declaration that since it is an interstate carrier, it is immune, as a matter of federal law, from the exercise of control by the PUC. The proceedings instituted by the PUC against Allegheny, however, raise only questions of state law, i. e., the extent of the rights and duties conferred upon Allegheny by the state certificate of public convenience and necessity issued pursuant to Pennsylvania's "Public Utility Law", 66 P.S. §1101 et seq. The PUC's complaints raise no federal questions. The federal questions do not enter the picture until they are injected by Allegheny as a matter of defense to the state complaints. Under such circumstances, to quote from Wycoff, *supra*, 344 U.S. at p. 248, 73 S.Ct. at p. 243:

> "[f]ederal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."

Although this is not properly a federal question matter, there is nevertheless jurisdiction in this court on the grounds of diversity of citizenship. 28 U.S.C. §1332(a).[10]

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10. 28 U.S.C. §1332(a) reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

It affirmatively appears from Allegheny's complaint that it is a Delaware corporation with its principal place of business in the District of Columbia; that the PUC is an agency of the Commonwealth of Pennsylvania; that the individual defendants are all citizens and residents of the Commonwealth of Pennsylvania; and that the amount in controversy exceeds $10,000, consequently, this court has jurisdiction on diversity grounds.

III. *Propriety of Federal Intervention*

Notwithstanding that there is jurisdiction, the question remains whether this court should hear and determine the substantive issues raised by the parties and exercise its power to grant the relief requested. The relief which Allegheny seeks is (1) a declaration that it is not subject to control by the PUC because it is an interstate carrier, and (2) a permanent injunction restraining enforcement of PUC's orders against it or its employees.

Although Allegheny's complaint is not, in terms, brought under the Declaratory Judgment Act, 28 U.S.C. §2201, the first portion of its prayer for relief is declaratory in nature. The Declaratory Judgment Act provides that in a case of actual controversy a competent federal court "may declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought." But whether to grant declaratory relief in a particular case is a matter committed to the court's sound discretion. See A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 82 S.Ct. 337, 7 L.Ed.2d 317 (1961); Brillhart v. Excess Ins. Co., 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); California v. Oroville-Wyandotte Irrigation Dist., *supra*.

Note 10—*Continued*

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The second portion of the relief sought is injunctive and whether a federal court should use its equity powers to enjoin the enforcement of orders of a state administrative agency is also a matter for the exercise of the court's sound discretion. Alabama Public Serv. Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951).

The Supreme Court of the United States has ruled that where a private party seeks either declaratory or injunctive relief against a state administrative agency, federal courts ordinarily should abstain from exercising their powers in the interest of federal-state comity. Public Serv. Comm. of Utah v. Wycoff, *supra*; Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*. In *Wycoff* there was express disapproval of attempts by lower federal courts to give anticipatory declarations as to state regulatory statutes, including determinations as to the authority of a state administrative agency over an interstate carrier, the Supreme Court stating, 344 U.S. at p. 247, 73 S.Ct. at p. 242:

> "It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State."

Whenever, therefore, the dispute between a private party and a state administrative agency concerns an unsettled question of state law, the federal courts should abstain from awarding declaratory relief. See Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, *supra*.

The doctrine of "equitable abstention" has only recently developed in the federal court system. See Wright, Federal Courts §52; Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749 (1959). As it applies to disputes between private parties and state administrative agencies, the primary thrust of the

doctrine is that where an order of the state agency predominantly affects local matters, if there is available to the aggrieved party adequate state judicial review, the federal courts should refuse to exercise their equity powers to restrain enforcement of the administrative order, thus avoiding unnecessary federal-state conflict. See Alabama Public Serv. Comm. v. Southern Ry. Co., *supra;* Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); Railroad Comm. of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), as amended, 311 U.S. 570, 61 S.Ct. 343, 85 L.Ed. 358 (1941). Cf. Sayers v. Forsyth Bldg. Corp., 417 F.2d 65 (5th Cir. 1969); Lerner v. Town of Islip, 272 F.Supp. 664 (E.D.N.Y.1967); Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Comm., 109 F.Supp. 385 (W.D. Pa. 1952). But see Public Utilities Comm. of Ohio v. United Fuel Gas Co., 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943) (where the exercise of federal court's equity powers was approved because of an inordinate delay in disposing of the matter in dispute). They should exercise such powers only when they are convinced that asserted federal rights cannot be preserved except by the granf of the extraordinary relief of an injunction. Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*. See also, Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

The instant case is clearly one for the application of the doctrine of federal abstention.

First, the dispute between the PUC and Allegheny predominantly affects local matters, i. e., intrastate air service and the scope of authority and procedures of the state administrative agency.

Second, the dispute involves an unsettled question of state law, i. e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier. The parties have cited no Pennsylvania authorities defining the limits of the PUC's authority over rights granted to such

carriers.[11] Until the state courts speak to the question we cannot know whether they will interpret the PUC's authority under the state act narrowly or broadly. In making their determination as to the scope of the PUC's authority, the state courts are bound, just as the federal courts are, to interpret and apply the federal Constitution and laws, and all of the arguments which Allegheny has sought to raise here under the interstate commerce and supremacy clauses of the federal Constitution must be given full consideration by the state courts. See Bonanza Air Lines, Inc. v. Public Serv. Comm. of Nevada, *supra*.

Finally, Pennsylvania law provides adequate judicial review of the actions of the PUC. At the time the PUC's order was entered Allegheny could have obtained review by seeking a preliminary injunction in the Court of Common Pleas of Dauphin County,[12] with a full hearing on the merits (66 P.S. §1441) and right of appeal to the Superior and Supreme Courts of Pennsylvania; or it might have appealed directly to the Superior Court to have the order of the PUC declared null and void (66 P.S. §1431). Under either procedure, there was available to Allegheny process for obtaining a writ of supersedeas to stay enforcement of the order pending judicial disposition. (66 P.S. §1433). Federal questions raised in any of the state court proceedings would be reserved for final review, by certiorari, to the Supreme Court of the United States, Public Serv. Comm. of Utah v. Wycoff, *supra*.

The foregoing are the state procedures which were available to Allegheny at the time the PUC's orders

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11. Since the state courts have not as yet determined the extent of PUC authority in this field, this decision does not conflict with City of Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed. 2d 1174 (1958).

12. Jurisdiction is now vested in the Commonwealth Court of Pennsylvania by "The Commonwealth Court Act", 17 P.S. §211.1 et seq.; 17 P.S. §211.14(a) (55).

were entered. The time for appeal to the state courts has long since passed. It appears that Allegheny may have deliberately permitted the appeal time to pass in order to obtain a ruling from the federal court as to the extent of the state administrative agency's authority over it. If Allegheny has, by that tactic, irretrievably lost the opportunity for judicial review of the administrative order, it was by its own choice. The fact that it has no other recourse for review is not sufficient reason for this court to exercise its power. Allegheny's evasion of state procedures should not be rewarded by a federal court of equity which must always be actuated by a "scrupulous regard for the rightful independence of state governments." Alabama Public Serv. Comm. v. Southern Ry. Co., *supra*, 341 U.S. at p. 349, 71 S.Ct. at p. 768. Permitting the bypassing of state procedures would lead to federal district courts becoming courts of review for state administrative agencies and to needless conflict between federal and state governments. See Trapp v. Goetz, 373 F.2d 380 (10 Cir. 1966).

For the foregoing reasons, this court will abstain from exercising its jurisdiction to consider the substantive issues sought to be raised by the parties. Allegheny's motion for summary judgment will be denied. PUC's motion for summary judgment, to the extent that it seeks dismissal of these proceedings, will be granted.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES INC., *Appellant*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

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(D.C. Civil Action No. 69-2148)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 4, 1972

Before HASTIE and ROSENN, *Circuit Judges*
and McCUNE, *District Judge*

OPINION OF THE COURT

(Filed July 21, 1972)

ROSENN, *Circuit Judge.*

Allegheny Airlines, Inc. (Allegheny) brought suit in the United States District Court for the Eastern District of Pennsylvania seeking a declaratory judgment holding that certain of the Pennsylvania Public Utility Commission's (PUC) orders and rules, pertaining to air service

between Pennsylvania cities, constituted an unlawful intrusion upon an area occupied exclusively by federal legislation. Allegheny also sought to perpetually enjoin the PUC from further actions against it.[1] The district court decided that the case presented a situation in which it was compelled to abstain. It therefore dismissed the complaint. *Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n.*, 319 F. Supp. 407 (E.D. Pa. 1970). From this decision, Allegheny appeals.

I. BACKGROUND

Allegheny received from the PUC an intrastate freight certificate in 1940, and a passenger certificate in 1949. Until 1963, one of the services provided by Allegheny, and for which it was and is certificated by the PUC, was non-stop service between Williamsport and Harrisburg, a distance of some 71 miles.

The flight between Harrisburg and Williamsport was part of a longer flight route designated by the PUC "intrastate route No. 5." It appears that intrastate route No. 5 was a segment of a still larger route, certified by the Civil Aeronautics Board (CAB), which is interstate in nature. That is to say, planes coming from outside of Pennsylvania fly through the state, landing along the route designated intrastate route No. 5.

In 1963, Allegheny unilaterally discontinued the segment of intrastate route No. 5 which directly connected Williamsport and Harrisburg. Allegheny did not entirely eliminate either Harrisburg or Williamsport from all Allegheny plane service. It was still possible to travel by air on Allegheny airplanes between Williamsport and Harrisburg, although such a journey might require flying to numerous distant points, on a variety of planes, before eventually reaching the desired destination.

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1. The Air Transport Association, National Association of Regulatory Utility Commissioners, and Civil Aeronautics Board have joined this case as Amicus Curiae.

After Allegheny discontinued the Williamsport-Harrisburg segment of route No. 5, the PUC and Allegheny entered into negotiations. In the meantime, Allegheny discontinued furnishing single plane direct service between at least six other pairs of points within Pennsylvania. All these discontinuances were on intrastate routes authorized and certificated by the PUC. Subsequently, the negotiations between the airline and the PUC broke down.

The PUC then took official agency action to compel Allegheny—*not to furnish the discontinued plane service*—but to apply to the PUC, in the manner prescribed by the applicable Pennsylvania law and the regulations of the PUC, whenever it wished to discontinue single plane direct service between intra-Pennsylvania points on routes authorized by the PUC. In the alternative, the PUC sought restoration of the deleted air service.

On June 10, 1968, the PUC issued a "Rule to Show Cause," which noted that Allegheny had abandoned the air service between Harrisburg and Williamsport without seeking approval of the Commission. The rule directed Allegheny to show cause why its certificate of public convenience should not be canceled, and other appropriate penalties imposed, for its discontinuance of service.

Allegheny answered this rule by arguing that under federal law and the CAB regulations and practice, it was permitted to make such changes at will. Further, it contended that "both as a practical matter and a matter of law, its Pennsylvania certificate of public convenience should be interpreted in a manner which is consistent with its federal certificate." It is clear that the thrust of the airline's answer was that federal law and practice had preempted the state regulation asserted by the PUC. A hearing on the Commission's rule was held on September 19, 1968. At this hearing, Allegheny offered no testimony or other evidence concerning the need to discontinue the service in question. Again, it was clear that the thrust of the airline's position was that federal law had preempted the asserted state action.

On June 23, 1969, the PUC entered an order making absolute its rule of June 10, 1968, and directed Allegheny to pay a penalty of $5,000 for its failure *to seek approval* of its abandonment of service between Harrisburg and Williamsport. The PUC also directed Allegheny to reinstitute the service within thirty days or, in lieu thereof, file with the PUC *nunc pro tunc* an appropriate petition or application seeking approval for the abandonment of service.

The June 23rd order was accompanied by an extensive written opinion, which defined the PUC's concerns, and which laid clear the legal foundation for their decision. The Pennsylvania authority for controlling the deletion of direct air service between Harrisburg and Williamsport was 66 P.S. §1122:

> Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, *and not otherwise*, it shall be lawful:
>
> * * *
>
> (b) For any public utility *to abandon or surrender, in whole or in part*, any service. . . .

And 66 P.S. §1171:

> —Every public utility shall furnish and maintain adequate . . . reasonable service. . . . *Such service also shall be reasonably continuous and without unreasonable interruptions or delay.*
> (emphasis supplied.)

The PUC also called attention to its own rule 8(b):

> (b) *Abandonment of Service*—Unless upon termination of certificate or order of the Commission, no common carrier shall abandon, in whole or in part, any operation *without first making application to the Commission for permission to do so.* . . .
> (emphasis supplied.)

The PUC felt that Allegheny's discontinuance of service between Williamsport and Harrisburg clearly came within these laws and regulations because:

> . . . even if facts had been established to indicate that air service between Harrisburg and Williamsport is available via Pittsburgh and or Scranton, this would not establish substantial compliance with respondent's obligation. *To reach a point 71 miles distant by use of several planes, several transfers and the traveling of several hundred miles during a period of several hours is not adequate air service by any standard.*
> (emphasis supplied.)

However, the PUC made clear that it was making no finding as to whether or not Allegheny, after a full and fair hearing, at which evidence was presented, should or should not be able to discontinue the service:

> . . . *we are not* attempting to determine whether or not respondent upon proper application . . . should be allowed to abandon the segment. . . . We do *not* expressly or impliedly, suggest that we may . . . require respondent to render unnecessary, unpatronized, unprofitable service. . . .
> (emphasis in text.)

Two primary considerations were defined as the principal motivations for the agency's action. First, the agency advanced what was essentially an equitable argument: Allegheny itself had approached the Commission, requested certification to fly the delineated intrastate route. In receiving this state benefit, it had accepted a corresponding duty to abide by the state regulations. The Commission thus sought to distinguish this case from one in which an airline had never sought state certification and the state agency was itself trying to bring the airline under its regulation:

> While . . . *prior to its Pennsylvania certifications for its intrastate services,* [Allegheny] *was under no obligation* to render intrastate service, *once it sought,* and was granted, and accepted *state certification* to render intrastate service between specific points within the Commonwealth of Pennsylvania, *it accepted the corresponding obligation* to do so under the laws of this state and the Rules and Regulations of this Commission.
> (emphasis supplied.)

The second consideration, interrelated with the first, was the practical effect Allegheny's refusal to come before the Commission, with evidence, might have on the regulatory structure of the PUC. The Commission was obviously concerned because Allegheny, since it first sought state certification in 1940, has become entwined within the state framework for regulating the state's various transportation facilities. As the PUC noted:

> The *thrust of these proceedings* is that existing certificated service *has been found, after application by the carrier* and after opportunity to affected parties to be heard, to be *necessary to the public interest.*
> (emphasis supplied.)

The initial state proceeding—that which found that the service which Allegheny sought to provide was in the public interest—might have affected numerous other facets of the state transportation system, aside from its obvious potential effect upon the plans and patterns of service of other airlines. Certification of public transportation, under the terms of the state act, can only be had if in the public interest. The fact that Allegheny had sought and been granted the route between Harrisburg and Williamsport might have deterred other service between these cities from developing. For example, bus service might have been decreased as a result of the air service which Allegheny offered to, and did, supply.

Moreover, a decision to abandon the air service might mean that the state would need to develop alternative services between these two cities. In any event, the concern of the PUC was that these problems could only be resolved, highlighted and defined through the normal regulatory structure, which provided for public hearings and the presentation of evidence concerning the specific service in question. Unilateral action on the part of public utilities—in total disregard of any procedural requirements—could produce confusion and disruption throughout the state.

Allegheny did not comply with the order of the PUC, nor challenge it before any state court. The airline, however, instituted suit in the district court for the Eastern District of Pennsylvania requesting a declaratory judgment against the PUC and a permanent injunction restraining the PUC from any further action. The district court, on cross motions for summary judgment dismissed the suit. The district court did not reach the merits, but predicated its decision on the abstention doctrine.

II. JURISDICTION

Allegheny pleaded jurisdiction both in terms of diversity, and 28 U.S.C. §1331(a), which gives jurisdiction over matters arising under the "Constitution, laws, or treaties of the United States." The district court did not believe that jurisdiction could properly be based on §1331 because:

> [i]n suits in the federal courts arising out of proceedings pending or threatened in state tribunals, the federal court's jurisdiction may not be predicated upon federal question defenses to the state proceedings. . . . It is only if the state *complaint* raises federal questions that the federal court's jurisdiction may be based on federal question grounds.
> (emphasis in text; citations omitted) *Allegheny Airlines Inc. v. PUC*, supra., at 411.

The district court concluded, however, that jurisdiction was properly grounded in diversity, since Allegheny was a Delaware Corporation with its principal place of business in the District of Columbia, the PUC was an agency of the Commonwealth of Pennsylvania, and finally, because the amount in controversy exceeded $10,000.

Although neither party has raised the jurisdiction issues in this appeal, "it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded." *Mansfield R. Co. v. Swan*, 111 U.S. 379. We believe that the district court correctly determined that §1331 jurisdiction was lacking, even though the issue may not be completely laid to rest. *See* Wright, *Law of Federal Courts*, (1970), at 62. As the district court noted, "[a]lthough Allegheny's complaint is not, in terms, brought under the Declaratory Judgment Act, 28 U.S.C. §2201, the first portion of its prayer for relief is declaratory in nature." *Allegheny Airlines, Inc. v. PUC*, supra, at 412. *Public Util. Comm'n. v. Wycoff Co.*, 344 U.S. 237 (1952) strongly supports the conclusion that suits of this kind, which request declaratory and injunctive relief, and raise the federal issue only as a defense in the state forum, will not support jurisdiction:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not the defense*, which will determine whether there is federal-question jurisdiction in the District Court.
> *Id.*, at 248. (emphasis supplied.)

Moreover, this conclusion is in line with the holding expressed in the landmark case of *Louisville and Nashville Ry. Co. v. Mottley*, 211 U.S. 149 (1908).

We, also, believe the district court was correct in holding that the plaintiff had made out a case for diversity of citizenship jurisdiction. The PUC has made no chal-

lenge to diversity jurisdiction or the potential damage which Allegheny alleges.[2] The requirements of diversity appear to be met. *Pennsylvania R. Co. v. City of Girard*, 210 F.2d 437 (6th Cir. 1965).

III. EQUITABLE INTERVENTION

Although jurisdiction exists, a federal court:

> . . . may, in its sound discretion, whether its jurisdiction is invoked *on the ground of diversity of citizenship* or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.'
>
> (citations omitted; emphasis supplied) *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-8 (1943).

The district court believed that this was such a case and therefore abstained. It held that "where a private party seeks either declaratory or injunctive relief against a state administrative agency, federal courts ordinarily should abstain from exercising their powers in the interest of federal state comity." *Allegheny Airlines, Inc. v. PUC*, supra, at 412. The court concluded that "where an order of the state agency predominately affects local matters, if there is available to the aggrieved party adequate state judicial review, the federal courts should refuse to exercise their equity powers to restrain enforcement of the administrative order, thus avoiding unnecessary federal-state conflict." *Id.*, at 413. It noted that in the instant case "the dispute between the PUC and Allegheny predominately affects local matters, i.e., intrastate air service and the scope of authority and procedures of the state administrative agency. *Id.* We agree.[3]

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2. Allegheny's major place of business is Washington, D.C. while the PUC is a Pennsylvania regulatory agency. Allegheny has made the unchallenged allegation that it will suffer damages, as a result of the June 23 order, in excess of $10,000.

3. In what was basically an alternative abstention holding, the district court noted that "the dispute involves an unsettled question of state law, i.e., the extent of the PUC's authority to regulate intrastate air rights granted to an interstate air carrier." Allegheny

The district court's holding was grounded on *Alabama Comm'n. v. Southern R. Co.*, 341 U.S. 341 (1951). There a railroad company applied to the Alabama Public Service Commission for permission to eliminate certain local passenger service. The Commission refused to allow discontinuance, citing local needs. The company, rather than taking an appeal through the state court system as provided for under state law, filed a complaint in federal district court seeking injunctive relief. Jurisdiction was grounded on diversity of citizenship and the presence of a federal question. A three judge court entered judgment holding the Commission order void and enjoining the Commission from enforcing its order or any penalty provisions of the applicable law.

On appeal the Supreme Court reversed. The crux of its holding was that:

> Equitable relief may be granted only when the District Court, *in its sound discretion* exercised with the *'scrupulous regard for the rightful independence of state governments* which should at all times actuate the federal courts,' is convinced that the asserted federal rights cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that '[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of *needless friction* with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case.
>
> (emphasis supplied; citations omitted) *Id.*, at 349-50.

Note 3—*Continued*

Airlines Inc. v. PUC, 319 F. Supp. 407, 413 (E.D. Pa. 1970). Since we find that the district court was correct in abstaining for the primary reasons it developed, we find it unnecessary to decide whether it correctly concluded there existed unclear state law. We note, however, that in our view, the PUC's authority to take the measures described above seems clear. 66 P.S. §1122.

The same critical factors of *Southern Ry.*—that the case involved significant state concerns, and an early entry of a federal court into the area might promote needless friction between state and federal jurisdiction—have formed the basis for abstention in numerous other cases. *See, e.g., Burford v. Sun Oil*, supra, at 332; *Great Lakes Dredge Co. v. Hufflman*, 319 U.S. 293, 298 (1943); *Railroad Commission v. Oil Co.*, 310 U.S. 573, 580 (1940); *Penn v. Williams*, 294 U.S. 176, 185 (1935).

As commentators construing the *Alabama* decision have noted, ". . . the Court must be considered to have ordered abstention *solely* for the purpose of avoiding federal-state friction." *Abstention*, 59 Col. L. Rev. 749, 759 (1968), (emphasis supplied). Whether or not the exercise of equitable abstention will, in a particular case, create federal-state friction, is a question for which there is no one simple test. Thus, equitable abstention has not produced clearly defined rules, as has the traditional and more common ground for abstention enunciated in *Railroad Comm'n. of Texas v. Pullman*, 312 U.S. 496 (1941).[4] However, the primary concern running through the cases in which the Court has abstained for equitable principles seems to be the possibility of friction caused by interference with the orderly procedures and rules of state *regulatory bodies*. *See, e.g., Alabama*, supra, *Burford*, supra. The instant case presents just such a threat: a serious possibility of disturbing the orderly state system of agency regulation of transportation within Pennsylvania.

Allegheny has contended here that it was not required to comply with the procedural regulations of the Commission for discontinuance of service because it was also an interstate air carrier. The Commission, on the other hand, has argued that once a carrier seeks and accepts state certification to render an intrastate service, it accepts the

4. See, generally, Bednar, *Abstention Under Delaney: A Current Appraisal*, 49 Texas L. Rev. 247 (1971); *Abstention and Certification in Diversity Suits*, 73 Yale L.J. 85 (1964); *Consequences of Federal Abstention*, 73 Har. L. Rev. (1960).

corresponding obligation to settle disputes as provided under state law and the rules and regulations of the Commission. Its primary position is that a certificated carrier may not discontinue the service without making an application to do so under Commission regulations and thereby giving affected parties an opportunity to be heard.

Stripped of the efforts to drape this case with federal questions, the facts show that Allegheny, without any attempt on the part of the PUC to extend its regulatory powers over it, made a written application to the PUC for a certificate of public convenience as an *intrastate* carrier to transport passengers between certain cities in Pennsylvania, including Harrisburg and Williamsport. The service it offered to provide was found by that Commission, after a hearing and an opportunity for affected parties to be heard, to be necessary to the public interest. A certificate of public convenience was granted and it is now held by Allegheny. Under the rules of the Commission, all or part of this service may be discontinued upon application by the carrier to the PUC and that agency's approval. Additionally, matters such as this which go to the jurisdiction of the PUC may be tested in special proceedings before the Pennsylvania Commonwealth court. 66 P.S. 1441. The thrust of these Pennsylvania rules and laws is that, once certified, a carrier must test these issues before service is discontinued.

The issue, thus, is not, at this stage, whether the airline may or may not discontinue the service in question because federal legislation has preempted the field. The issue is whether a state certificated public utility may arbitrarily ignore the procedural rules of the Commission which require that issues, including jurisdictional issues, be raised before discontinuance of service. We note that Allegheny might have sought federal declaratory relief before discontinuing the air service.[5] In the alternative, of course,

5. This might, perhaps, have been action substantially equivalent to bringing the preemption issue before the Commission or before the Commonwealth Court under 66 P.S. 1441.

Allegheny might have sought state consideration of its federal preemption argument before discontinuing the air service. It did neither: with no prior warning, and in total disregard of the state policy, it abruptly terminated the state certificated flight. If Allegheny can discontinue state certificated service with no notice and then forestall state action by proceeding to the federal courts, other state certificated carriers may attempt similar action. The carefully regulated state transportation system could be thrown into chaos. For this court to reach the merits of Allegheny's contentions would be to ignore the state regulatory body in the same manner the airline has. This is precisely the kind of action that the Supreme Court has counseled against. *See, e.g., Alabama*, supra.

There are several additional factors, perhaps unique to this case, which also dictate our conclusion that the district court correctly exercised its discretion. First, we note that the state concerns, in terms of the subject matter in question here, are significant. Commercial carriers can operate only if airports, runways, and related facilities are provided. These often require large expenditures, particularly in densely populated areas, frequently at considerable community sacrifice and effort. The communities involved here may have come to depend on the direct air service which Allegheny has supplied in the past. If this be true, the arbitrary discontinuance of direct air service without notice, an opportunity to be heard, or time in which to secure other means of transportation, may leave them isolated. We can only suggest, and not document, the local needs because of Allegheny's decision to discontinue the air service without first approaching the Commission. However, in any case, under the applicable Pennsylvania law, a presumption exists that certificated public utility service is needed and vital, until a public utility itself proves otherwise. *Hostetter v. PUC*, 49 A.2d 862 (Super. Ct., Pa. 1946).

Secondly, Allegheny has presented no evidence which suggests that it would have been harmed had it had to

resort to the state agency forum, or Commonwealth courts, before discontinuing the air service in question. It has approached the PUC for route changes many times, and it appears that all the airline's requests have been granted.[6] In any case, Allegheny may be able to raise its preemption arguments, should the PUC proceed to state court to enforce the order of June 23. *Cf. Jones Motor Co. v. Pennsylvania Public Utility Comm'n.*, 149 A.2d 491 (Super. Ct. Pa.), reversed on other grounds, 361 U.S. 11 (1959).

Thirdly, if local communities have come to rely upon the services provided by Allegheny, such reliance would be reasonable in light of the affirmative action of the airline itself. Approximately thirty years ago, the airline sought and was granted, rights to transport property on intra-Pennsylvania routes; approximately twenty years ago, it sought, and was granted the right by the PUC to transport persons as well as property between points in Pennsylvania. From that date, until the action delineated here, the airline has complied with the procedural requirements of Pennsylvania law. Thus, this case is significantly different—and poses a greater danger of exacerbating federal state relations—than the case of an airline which has never approached a state commission, and finds that a state commission is attempting to regulate it for the first time on the supposition that it is engaging in intrastate operations. *See e.g., Pub. Util. Comm'n. v. United Air Lines*, 346 U.S. 402 (1953).

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6. The stipulated statement of facts makes clear that Allegheny has worked within the framework of the PUC's regulations for many years. On many occasions when it wished to eliminate service to a Pennsylvania city, it has sought the PUC's prior approval. To cite but one example, on May 22, 1968, it petitioned the PUC to allow it to eliminate Hazleton as a point serviced by Allegheny airplanes. It also appears from the various changes in Allegheny's certificate of public convenience that it has approached the PUC when it wanted to add a stop flight between points which were being serviced by non-stop direct service. Thus, for example, it requested, on September 12, 1960, to service Reading as an intermediate point on its intrastate route No. 2 between Pittsburgh and

Fourthly, the danger of creating federal-state friction is intensified because of the peculiar nature of the relief requested by the airline. At oral argument, the district court pointed out that Allegheny was seeking the best of all possible worlds. It wished to retain its state rights and, at the same time, to be relieved by federal injunction of its state duties.[7] This is precisely what the airline desires. It asks for a perpetual injunction which would enjoin the PUC from "*any action or proceeding* for any violation of the laws of the Commonwealth of Pennsylvania based upon action by Allegheny in changing its patterns of service." Yet, if this relief be granted, the PUC would be unable to terminate the airline's state certificates of public convenience. The airline, while not being subject to state regulation, would maintain whatever benefits accrue to holders of state public utility certificates. The case therefore is different from that of an interstate carrier whose routes contain several short intrastate segments, and who wishes to surrender its state certificate and remove itself totally from the state jurisdiction.

Finally, we do not believe that there are significant federal concerns which would override the other factors mentioned above. Even if it should be ultimately deter-

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Philadelphia. Finally, it also appears from the changes in Allegheny's certificate of public convenience that it has received PUC approval to eliminate non-stop air service between Pennsylvania cities. Thus, for example, in April of 1953, it sought approval to eliminate the flight between Johnstown and Dubois, which had been designated intrastate route No. 5.

7. The district court noted:

. . . you [Allegheny] are at somewhat of a disadvantage in that you come before me, having sought and obtained certain local rights, having had those local authorities who granted you those rights determine that you are not complying, and in your having failed to either pay the fine or keep the rights because you are dissatisfied with the interpretation, and instead you are asking me to enjoin them from enforcing their interpretation, of the rights they have granted you and *yet at the same time permit you to retain those rights.*
(emphasis supplied).

mined that the state does not have power to regulate the actions which precipitated this suit, a temporary co-existence of federal-state regulation will not frustrate any immediate goals or policies of the Federal Aviation Act. At least a residual power to regulate air transportation lies with the states. The scheme of federal control has not been hampered, even though some areas exist over which the states exercise sole or concurrent control.[8] *See, e.g., Colorado Anti-Discrimination Comm'n. v. Continental Air Lines, Inc.*, 372 U.S. 714 (1962); *Pub. Util. Comm'n. v. United Air Lines*, 346 U.S. 402 (1953); *Loma Portal Civic Club v. American Airlines, Inc.*, 394 P.2d 548 (Sup. Ct. Calif. 1964); *People v. Western Air Lines*, 268 P.2d 723 (Sup. Ct., Cal. 1954).

For the reasons outlined above, we conclude that the district court did not abuse its discretion in refusing to exercise its power to intervene.

The judgment will be affirmed.

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8. All parties to this suit, including the amicus Civil Aeronautics Board, agree that under current CAB regulations, Allegheny may, or may not, at its option, connect Harrisburg and Williamsport by non-stop flights. Additionally, the CAB has declined to take a position with respect to the district court's jurisdiction or the appropriateness of its exercise.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES, INC., *Appellant*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

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(D. C. Civil Action No. 69-2148)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE and ROSENN, *Circuit Judges*, and McCUNE, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 10, 1970, be, and the same is hereby affirmed, with costs taxed against the appellant.

ATTEST:

M. Elizabeth Ferguson

Chief Deputy Clerk

July 21, 1972

Certified as a true copy and issued
in lieu of a formal mandate on
September 21, 1972.

Test: FRANCES R. MATYSIK
Deputy Clerk, United States Court
of Appeals for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 71-1057

ALLEGHENY AIRLINES, INC.,

Appellant

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, and its Chairman, GEORGE I. BLOOM and WILLIAM F. O'HARA, JAMES McGIRR KELLY, DANIEL HUYETT III and LOUIS J. SPARVERO, Members of The Commission

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, HASTIE, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges* and McCUNE, *District Judge*

The petition for rehearing filed by

Allegheny Airlines, Inc.

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Van Dusen concurs in

this order because he concurs in the result reached by the opinion of July 21, 1972 as stated in these words: ". . . we conclude that the district court did not abuse its discretion in refusing to exercise its power to intervene." (p. 16, slip opinion)

By the Court,

Dated: September 13, 1972 Circuit Judge

Judge Gibbons dissents from the denial of the petition for rehearing, on the ground that this is an inappropriate case for abstention.

FEDERAL AVIATION ACT OF 1958:

§1302. Consideration of matters in public interest by Board

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement and development of civil aeronautics. Pub.L. 85-726, Title I, §102, Aug. 23, 1958, 72 Stat. 740.

Public Utility Law:

§1102. Definitions

The following words, terms and phrases shall have the meanings ascribed to them in this section, unless the context clearly indicates otherwise.

. . .

(5) "Common Carrier" means any and all persons or corporations holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property, or both, or any class of passengers or property, between points within this Commonwealth by, through, over, above, or under land, water, or air, and shall include forwarders, but shall not include contract carriers by motor vehicles, or brokers, or any bona fide cooperative association transporting property exclusively for the members of such association on a nonprofit basis.

. . .

(17) "Public Utility" means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:

. . .

(c) Transportaing passengers or property as a common carrier;

. . .

§1122. Enumeration of acts requiring certificate

Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

(a) For any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by—

(1) A certificate of public convenience heretofore or hereafter granted under this act or under The Public Service Company Law, July 26, 1913 (P.L. 1374), or

(2) A registration certificate granted by the commission under section 1401 of this act, or

(3) An unregistered right, power or privilege preserved by section 1401 of this act.

(b) For any public utility to abandon or surrender, in whole or in part, any service: Provided, That the provisions of this paragraph shall not apply to discontinuance of service to a patron for nonpayment of a bill, or upon request of a patron.

(c) As a condition of its approval of any transaction covered by this section and involving those railroad carriers wholly located within this Commonwealth subject to the provisions of this act, the commission shall require a fair and equitable arrangement to protect the interests of the railroad employes affected and the commission shall include in its order of approval the terms and conditions it deems fair and equitable for the protection of the employes.

(d) The terms and conditions which the commission prescribes shall provide that, during the period of four years from the effective date of the order, the employes of the railroad carrier affected by the order shall not be in a worse position with respect to their employment except that any protection afforded an employe shall not be required to continue for a period longer than that during which the employe was in the employ of the railroad carrier prior to the effective date of the order. Notwithstanding any other provision of this section, the commission may accept as fair and equitable an agreement pertaining to the protection of the interests of the employes entered into by the railroad carrier and the duly authorized representatives of the employes.

(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to

acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: Provided, however, That such approval shall not be required—(1) if the undepreciated book value of the property to be acquired or transferred does not exceed one thousand dollars; or (2) if the undepreciated book value of the property to be acquired or transferred does not exceed the lesser of —(a) two per centum of the undepreciated book value of all of the fixed assets of such public utility, or (b) five thousand dollars in the case of personalty or fifty thousand dollars in the case of realty; or (3) if the property to be acquired is to be installed new as a part of or consumed in the operation of the used and useful property of such public utility; or (4) if the property to be transferred by such public utility is obsolete, worn out or otherwise unserviceable.

But exceptions (1), (2), (3), and (4) shall not be applicable, and approval of the commission evidenced by a certificate of public convenience shall be required, if any such acquisition or transfer of property involves a transfer of patrons.

(f) For any public utility to acquire five per centum or more of the voting capital stock of any corporation.

(g) For any municipal corporation to acquire, construct, or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits.

As amended 1963, Aug. 24, P.L. 1225, §2; 1971, July 14, P.L. —, No. 44, §1.

§1183. Proper service and facilities established on complaint

Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unrea-

sonable, unsafe, inadequate, insufficient, or unreasonably discriminatory or otherwise in violation of this act, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public, and shall fix the same by its order or regulation. 1937, May 28, P.L. 1053, art. IV, §413.